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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, and THE COMMONWEALTH & SOUTHERN CORPORATION.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

FEDERAL POWER COMMISSION and SOUTH CAROLINA ELECTRIC & GAS COMPANY.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

South Carolina Public Service Authority (herein called "Authority") respectfully prays for writs of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered November 10, 1948, affirming orders and opinions of the Securities and Ex-

change Commission (herein called "SEC") under the Public Utility Holding Company Act of 1935 [1] and of the Federal Power Commission (herein called "FPC") under the Federal Power Act,[2] which approved respectively the sale by Commonwealth and Southern Corporation (Delaware) (herein called "Commonwealth") and the acquisition by South Carolina Electric & Gas Company (herein called "Electric & Gas") of all the common stock of South Carolina Power Company (herein called the "Power Company").

OPINIONS AND ORDERS BELOW.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 171 F. 2d 948 (1948). A copy of the opinion and order is set forth in the printed record at pages R-SEC 310 to 317, and R-FPC 324 to 331.[3] The opinions and orders of the two Federal Commissions are set forth in the printed record, the opinion and order of the SEC at pages R-SEC 2 to 29 (R-FPC 74 to 101) and the opinion and order of the FPC at pages R-FPC 2 to 10 (R-SEC 89 to 97).

JURISDICTION.

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 10, 1948. (R-SEC 317; R-FPC 331.) The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935, (August 26, 1935, c. 687, Title I, Sec. 24(a), 49 Stat. 834; 15 U. S. C., Sec. 79x(a)), Section 313(b) of the Federal Power Act, (August 26, 1935, c. 687, Title II, Sec. 213, 49 Stat. 860; 16 U. S. C. Sec. 825*l*(b)), Section

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[1] August 26, 1935, c. 687, Title I, Sec. 33; 49 Stat. 838; 15 U. S. C. Sec. 79.

[2] August 26, 1935, c. 687, Title II, Sec. 212; 49 Stat. 847; 16 U. S. C. Sec. 791 et seq.

[3] References to the printed record are designated "R-SEC" in the case of the record on review of the SEC's order, and "R-FPC" in the case of the record on review of the FPC order, followed by appropriate page numbers.

10 of the Administrative Procedure Act, (June 11, 1946, c. 324, Sec. 10, 60 Stat. 243; 5 U. S. C. 1009) and Title 28, United States Code, Sections 1254 and 2101.

By order of the Chief Justice of the United States Supreme Court, dated January 25, 1949, the time within which to file this petition was extended to and including February 23, 1949.

STATUTES INVOLVED.

The pertinent provision of the Public Utility Holding Company Act of 1935 and of the Federal Power Act are set forth in the printed record at pages R-SEC 109 to 111 and page R-FPC 110, respectively.

QUESTIONS PRESENTED.

1. Whether the Court below erred in holding that the decision of the Supreme Court of South Carolina in *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, 20 S. E. 2d 645 (1942), was a bar to the right of Petitioner to acquire the stock of the Power Company, when neither Federal Commission ventured to take this position as the basis for its decision and when the Supreme Court of South Carolina itself expressly left this question open.

2. Whether the Court below erred in approving the refusal of both Federal Commissions to consider the most important relevant evidence in the record bearing upon the public and consumer interest, each on the ground that this evidence should properly be considered by the other.

3. Whether under Sections 11(e) and 12(d) of the Public Utility Holding Company Act of 1935 the SEC erred in approving the sale by Commonwealth of the Power Company's stock to Electric & Gas and exempting it from the requirements of competitive bidding, upon a finding that the sale met the statutory standards of Section 12(d) of the Act relating to "the public interest" and "protection

of consumers and investors," when the SEC expressly refused to consider the most important relevant evidence presented by the record bearing upon the public and consumer interest.

4. Whether the Federal Power Commission erred in approving under Section 203(a) of the Federal Power Act the acquisition by Electric & Gas of the stock of the Power Company upon a finding that such acquisition was "consistent with the public interest," when the FPC expressly refused to consider the most important relevant evidence in the record bearing upon the public interest.

STATEMENT.

This case involves a review of an opinion and order of the SEC dated March 25, 1948 (R-SEC 2; R-FPC 74)[4] approving and authorizing under Sections 11(e) and 12(d) of the Public Utility Holding Company Act of 1935 the sale by Commonwealth to Electric & Gas of all of the common stock of the Power Company and exempting the sale from the competitive bidding requirements of the SEC's Rule U-50, and of an order dated April 29, 1948, of the FPC under Sec. 203(a) of the Federal Power Act authorizing the acquisition by Electric & Gas. (R-SEC 89; R-FPC 2.)[5]

The Authority opposed the applications before both Commissions on the grounds that it had made a better offer for the property, that Commonwealth had rejected this offer and had improperly and illegally discriminated against the Authority for the reason that it is a public agency and that the transaction could not be reconciled with the applicable statutory standards in the two Acts relating to the public interest and the interest of investors and consumers, in view of the far greater benefits to be derived by the public and consumers from sale to the Authority as regards reduced

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[4] Issued as Holding Company Act of 1935 Release No. 8080, —— SEC ——.

[5] FPC Docket No. E-6104.

rates, reduced investment, greater power supply, and natural integration of facilities.

Corporations Involved.

The Authority is a corporation, an agency of the State of South Carolina, created by Act No. 887 of the Acts of the General Assembly of South Carolina for 1934 [6] (R-SEC 115; R-FPC 111) with its principal place of business at Moncks Corner, Berkeley County, South Carolina. It owns, operates and sells electric energy from a $60,000,000 Federal Works Agency financed 130,000 kilowatt hydro-electric system in southern South Carolina. The Authority's dam is located at Pinopolis on the Cooper River thirty-five miles from Charleston and generates more than 600,000,000 kilowatt hours per year of cheap hydro-electric power. It sells more than one-quarter of this power to the Power Company, which is located nearby and is the chief natural distribution and transmission outlet for the cheap power the Authority produces. (R-SEC 57-60; R-FPC 42-45.)

The Power Company, a South Carolina corporation, is engaged in the generation and purchase of electric energy and its distribution and sale at retail in Charleston, Beaufort, Aiken, and 135 other communities and rural areas in the Coastal Plain or southern portion of South Carolina. Its generating facilities produced an aggregate of 121,721,399 kilowatt hours in 1946, the greater part of which being steam generated. It sells approximately 303,000,000 kilowatt hours per year and buys more than half of this power from the Authority. The company is also engaged in the manufacture and sale of gas and in rendering bus transportation service in Charleston and nearby communities. All of the presently outstanding 800,000 shares of common stock of the Power Company have been owned by Commonwealth. At issue in these proceedings is the action of the SEC in

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[6] 38 S. C. Stat. at Large, p. 1507; Secs. 8555-11 through 8555-24, Code of Laws of South Carolina, 1942.

approving the sale of this stock to, and the action of the FPC authorizing its acquisition by, Electric & Gas.

Electric & Gas, a South Carolina corporation, is engaged in the generation and purchase of electric energy and its distribution and sale at retail in Columbia, South Carolina, and 63 other communities in the northern and central portions of that State.

Authority's Six-Year Effort to Purchase Power Company.

On August 1, 1947, the SEC, after more than seven years of simplification proceedings under the Public Utility Holding Company Act of 1935, granted conditional approval of a plan proposed by Commonwealth under Section 11(e) of that Act, and issued an order[7] pursuant to Section 11(b)(1) requiring Commonwealth, among other things, to divest itself of the Power Company, all of whose stock it owned.

Prior to the SEC's said order of August 1, 1947, and from time to time since as early as 1941, the Authority was in negotiation with Commonwealth for the purchase of the Power Company. (R-SEC 49, 51; R-FPC 34, 36.) On July 31, 1947, the Authority had offered $10,600,000 for the Power Company's 800,000 shares of capital stock. (R-SEC 50, 51; R-FPC 35, 36.)

Commonwealth's Illegal and Restrictive Conditions.

Commonwealth rejected this offer but early in September, 1947, indicated its willingness to enter into a contract for $12,000,000 with the Authority subject to a number of restrictive conditions. *The Commonwealth-proposed conditions provided among other things for an undertaking by the Authority not to compete with the operating subsidiaries to be retained by Commonwealth in adjacent areas, for continued control by Commonwealth of the Stevens Creek*

[7] Issued at Holding Company Act of 1935 Release No. 5455, —— SEC ——.

Hydro Plant,[8] *and finally, in the event that the sale were not consummated, for the renewal for twenty-five years of the Authority's existing two-year power supply contract with the Power Company.* (R-SEC 50-52; R-FPC 35-37.)

The Authority considered that these conditions were against public policy and illegal.[9] Accordingly, it rejected them by letter dated September 18, 1947, but increased its offer for the stock by $1,000,000, i.e., to $11,600,000. (R-SEC 62-66; R-FPC 47-51.) Meanwhile, in June, 1947, Commonwealth resumed its negotiations with Electric & Gas. (TR-SEC 55, 56.)[10]

Commonwealth Rejects Authority's Offer.

By letter dated October 3, 1947, Electric & Gas offered $10,200,000 for the Power Company's stock. (TR-SEC 35, 36.) Although unsuccessful in inducing Electric & Gas to increase this offer, which was $1,400,000 below that of the Authority, Commonwealth nevertheless accepted it and on October 28, 1947, entered into a contract with Electric & Gas for the sale of the stock. Commonwealth gave as its reason for accepting the less favorable bid that in the opinion of its Board the offer of Electric & Gas was "far more certain of consummation and *did not constitute a competitive publicly operated threat to the neighboring southern companies remaining subsidiaries of Commonwealth.*"[11] (R-SEC 104; R-FPC 108.)

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[8] On Savannah River between South Carolina and Georgia near Clark's Hill Federal Power Project. (See R-SEC 72, 73; R-FPC 57, 58.)

[9] See Sec. 10(h) of the Federal Power Act "That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electric energy, to restrain trade, or to fix, maintain or increase prices for electric energy or service are hereby prohibited." (August 26, 1935, c. 687, Title II, Sec. 206, 49 Stat. 842, 16 U. S. C. Sec. 803(h).)

[10] "TR-SEC" refers to Transcript of Hearing before SEC, which is included in both records.

[11] Emphasis throughout Petition and Brief supplied by Petitioner.

The *Creech* Case.

In speaking of the Electric & Gas bid as "more certain of consummation" Commonwealth had reference to alleged "doubts" as to the Authority's right to purchase the Power Company's stock by reason of the ruling of the Supreme Court of South Carolina in *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, 20 S. E. 2d 645 (1942). (Bonham, C. J., dissenting.) Commonwealth has largely relied upon these "doubts" to justify to the SEC and the Court below its sale to Electric & Gas. (R-SEC 15, 16, 33-37; R-FPC 87, 88, 18-22.)

Under its enabling act the Authority has the broadest powers of acquisition, purchase, and operation, without geographical limitation. These include authority:

> "(7) To build, *acquire,* construct and maintain power houses and any and all structures, ways and means, necessary, useful or customarily used and employed in the manufacture, generation and distribution of water power, steam electric power, hydro-electric power and any and all other kinds of power, including power transmission lines, poles, telephone lines, substations, transformers, and generally all things used or useful in the manufacture, distribution, purchase and sale of power generated by water, steam or otherwise." and
>
> "(8) To manufacture, produce, generate, transmit, distribute and sell water power, steam electric power, hydro-electric power or mechanical power *within and without the State of South Carolina.*" [12]

There is one section of the act, however, which prevents the Authority from making "investigations, studies and considerations" north of Columbia, South Carolina.[13]

In the *Creech* case the South Carolina Court held that the Authority was without power to acquire Electric & Gas, most of whose properties lie north of Columbia. In its opinion the Court also used language which might be taken to

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[12] Sec. 8555-13(7) and (8) Code of Laws of S. C., 1942.

[13] Sec. 8555-13(21) Code of Laws of S. C., 1942 (R-SEC 120; R-FPC 116).

imply that the Authority was without power to acquire completed and operating public utility systems, wherever located. Thus, the statement was made that the Authority had no "power to buy an existing utility system in order to produce, distribute and sell electric power."[14] In the same paragraph of the opinion, however, the Court had first said "It would have been a simple matter for the legislature to have explicitly provided for the purchase of established, existing power plants and public utilities *in the area claimed* but it has not done so."[15]

The Court below has taken the position that the *Creech* decision rested not on the geographical limitation in the enabling act but on a finding that the Authority lacks power to acquire an existing utility system anywhere. (170 F. 2d 951; R-SEC 313-314; R-FPC 327-328.) This view is demonstrably mistaken.

It was precisely because it feared that the broader language of the opinion might reflect on its right to purchase a utility or other property in its own territory that the Authority immediately petitioned the South Carolina Court for a rehearing and, alternatively, for a statement making it clear that the Authority did have power to acquire such properties south of Columbia, *some of which the Authority pointed out it had already purchased.* In denying this petition the unpublished *per curiam* order of the Court stated as follows:

> "The sole question which this Court undertook to discuss and adjudge, as stated in the majority opinion, is 'whether the Authority under the terms of the statute chartering it construed and interpreted in the light of the whole Act, and considering the history of the legislation,—has power to purchase completed and operating electric utility systems situated at and North of Columbia, and the gas and transportation business connected therewith.' The pleadings confined us to a determination of this material question, and the Court did not undertake to pass upon or decide any other

[14] 20 S. E. 2d 650, 651.

[15] 20 S. E. 2d 650.

issue; nor would it be proper to go outside of the record and do so now." (R-SEC 107.)

Furthermore, Chief Justice Bonham, who had dissented vigorously from the original *Creech* decision, made the following separate statement:

> "In view of the fact that four members of the Court have decided the questions raised by the petition for rehearing, I see no need for a rehearing to be had, and therefore, I concur in so much of the foregoing order as refused a rehearing; but with respect to the petition for alternative relief, I think that it would have been entirely proper for the Court, in its majority opinion, to have decided the question of the power of the Authority to acquire completed and operating properties in areas of the State not specifically excluded by the Act.
>
> "The construction of Section 3 of the enabling Act (Acts S.C. 1934, page 1507) was involved in the litigation, as was the first proviso thereto, and therefore I think it would have been within the province of the Court in this case to have determined the rights of the defendants with respect to the acquisition of completed and operating properties within the normal area of the operations of the Authority.
>
> "For the reasons expressed in my dissenting opinion in this case, I think this relief should have been granted." (R-SEC 107-108.)

It seems quite clear, therefore, that the majority of the Court and Chief Justice Bonham all considered that the *Creech* decision was limited to an acquisition north of Columbia and therefore certainly did not decide that the Authority was without power to purchase completed utilities located in its own territory. Nevertheless, the Court below has ruled that the *Creech* case decided just that. (R-SEC 313-314; R-FPC 327-328.)

The Power Company, which the Authority now seeks to acquire, is located south of Columbia in the natural geographical production and distribution service area of the Authority, and obtains more than half the electric energy it sells from the Authority. (R-SEC 57; R-FPC 42.)

Commonwealth and the *Creech* Case.

Although the opinion in the *Creech* case had been issued five years earlier and was well known to Commonwealth throughout the course of its negotiations with the Authority, it had not been put forward as an obstacle to these negotiations nor did it prevent Commonwealth as late as September, 1947, from telling the Authority it would accept $12,000,000 subject to the restrictive conditions. (R-SEC 33, 34, 38; R-FPC 18, 19, 23.) In fact, Commonwealth's President testified before the Commission that this alleged question of uncertainty was not an insuperable obstacle if the Authority had complied with the restrictive conditions proposed by Commonwealth, and that Commonwealth only concluded that the Authority was without the right to buy *"after you wouldn't go along with our conditions."* (R-SEC 37; R-FPC 22.)

The Authority had intended to finance its purchase of the Power Company stock by issuing its bonds and in line with the prudent procedure customary in State agency bond cases proposed to secure the approval of the South Carolina Supreme Court. (R-SEC 66, 67, 72; R-FPC 51, 52, 57.) Since South Carolina then had no declaratory judgment law that applied in the absence of a written contract, the question could only be raised for judicial determination either upon the basis of a firm sales agreement or upon an agreed statement of facts as an actual controversy based upon a Commission order for competitive bidding.[16] During the earlier negotiations Commonwealth agreed to cooperate in having the matter settled by entering into such an agreement. Its final refusal to accept the offer of the Authority frustrated this opportunity to secure a final determination. (R-SEC 38, 39; R-FPC 23, 24; TR-SEC 169, 170.) Had the SEC ordered open competitive bidding in this case it would have created an immediate justiciable controversy as to the Authority's right to bid which could and

[16] Sections 660 and 668, Code of Laws, S. C., 1942. Set out in full at R-SEC 133.

would have been settled in a few weeks by the State Courts of South Carolina.

Public Interest Considerations.

Apart from the fact that the Authority had made an offer for the Power Company $1,400,000 higher than the offer of Electric & Gas, the uncontroverted evidence in the record showed that for other considerations the interests of the public and of consumers required both Commissions below to disapprove this transaction. These considerations may be briefly summarized as follows:

1. The Authority and the Power Company serve the same area, the Coastal Plain of South Carolina which includes Charleston and most of the industrial centers of the State. The prosperity of South Carolina depends in large measure upon the healthy growth and development of the Coastal Plain, which in turn depends upon having available abundant cheap electric power.[17] A combination of the Authority and the Power Company, because of the objective circumstances of their relative geographical positions, their financial condition and the make-up of their generating and distributing plants will assure this result. A combination of the Power Company and Electric & Gas, for precisely the same reasons, makes such a result impossible. Instead it condemns the consumers of the Coastal Plain and all who depend upon the development of that area to the certain prospect of an inadequate power supply and high rates.

2. More specifically, the determining circumstances affecting the three utilities are these:

(a) *Generating Capacity*—The Authority produces at its Pinopolis hydro located in the Coastal Plain 35 miles from

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[17] See testimony of Senator O. T. Wallace and Mayor Morrison of Charleston, S. C. appearing at Vol. VIII pp. 233-235, and pp. 244-246 of the Transcript of Hearing before South Carolina Public Service Commission, (herein referred to as "TR-SCPSC") which is included in both records.

Charleston more than 600,000,000 kilowatt hours per year of cheap hydro-electric power. (R-SEC 57; R-FPC 42.) The Power Company, with an extensive distributing network serving Charleston and the Coastal Plain, sold in 1946 approximately 303,000,000 kwh per year, more than half of which it purchased from the Authority. (R-SEC 57; R-FPC 42.) Its own production is low, 121,721,399 kwh in 1946, largely generated by high-cost steam plants. (R-SEC 58, 91; R-FPC 43, 4.) These steam facilities, although wholly inadequate to meet the Power Company's service commitments, are more than adequate to "firm up" the Authority's hydro. (R-SEC 47, 58, 59, 91, 92; R-FPC 32, 43, 44, 4, 5.) Electric & Gas, which serves the central part of the State, generated in 1946 569,387,890 kwh, but nevertheless, as the FPC found, was obliged to supplement this by 122,000,000 kwh through purchase and interchange to meet its service commitments. (R-SEC 91; R-FPC 4.) The principal reason for Electric & Gas's tight generating position is that it has oversold by approximately 125% the power from its principal hydro at Lake Murray, approximately 300,000,000 kwh per year, on long term wholesale contracts expiring in 1980 to outside utilities serving other areas than its own. (R-SEC 46; R-FPC 31.) Since it is obvious that a combination of two such power-short companies would be unable to meet the present demands of their own joint areas, to say nothing of future increased demand, Electric & Gas has stated in the record that the consolidated companies plan a construction program of approximately $20,000,000 over the next five years of which at least $11,000,000 will be for new generating capacity. (TR-SCPSC Vol. VIII, 59, 60, 131-132.)

(b) *Financial Position*—The relative revenues and earnings of the Power Company whether considered in relation to total assets, plant account or stockholders' equity, are substantially greater than the relative revenues and earn-

ings of Electric & Gas. (R-SEC 41-46, 85, 86; R-FPC 26-31, 70, 71.) Thus while the Power Company, with the Authority's cheap power to sell, has been earning approximately 12% on its net stockholders' equity, the evidence shows that Electric & Gas is in dubious financial shape and is earning about 3.6% on its net stockholders' equity—this despite the fact that the average kwh cost of electric energy to consumers of the Power Company prior to its sale to Electric & Gas was 2.6 cents as against 3.032 cents for consumers of Electric & Gas. (R-SEC 40, 41; R-FPC 25, 26.) The Power Company is "ripe" for a rate reduction. (R-SEC 46-48; R-FPC 31-33.) Since the consummation of the sale Electric & Gas has obtained an approximate 10% increase in its electric rates. (R-SEC 305; R-FPC 319.) Further as to earnings, it appears that Electric & Gas, although it refused to promise any reduction in rates upon acquisition of the Power Company (and has in fact raised its own rates), nevertheless expected that the stock which it issued to finance the acquisition would earn approximately 20% in the first year. (R-FPC 15, 16.) During the preceding year Electric & Gas failed to make its common stock dividend by $115,000. (R-SEC 44, 45; R-FPC 15, 29, 30.) Finally it appears from the record that upon the acquisition of the Power Company by Electric & Gas the stockholders' equity drops from approximately 37% and 31% respectively for the two companies to a joint equity of approximately 20%. (R-FPC 13.)

3. The specific consequences in these circumstances of the acquisition of the Power Company by Electric & Gas for the consumers of both companies, and particularly the consumers of the Coastal Plain, are not far to seek.

(a) *Adequacy of Power Supply*—It is quite clear that with the combination of these power-deficient utilities serving different areas neither group of consumers has assurance that even its present needs can be served until the completion of the projected costly 5-year construction pro-

gram. It is equally clear that with a combined equity of 20% the consolidated companies will do well to finance this construction program on any terms, and can scarcely do so advantageously. On the other hand, a combination of the Power Company and the Authority would bring together without significant further construction ample firm power to meet the present and future needs of the vital Coastal Plain, with a probable surplus left over to supplement the shortages of Electric & Gas in its own area. (R-SEC 47, 57, 58,; R-FPC 32, 42, 43.)

(b) *Rates*—At the hearing before the South Carolina Public Service Commission, *the Authority made a firm offer upon acquisition of the Power Company to give the consumers of the Coastal Area an immediate 10% rate reduction, with others to follow.* (R-SEC 55, 56; R-FPC 40, 41.) The record is clear that the position and condition of the two companies is such that upon their combination there would be not only the will but, more important, the ability to make these reductions. On the other hand, Electric & Gas flatly refused to promise any reduction in rates and said that it only hoped that it could avoid an increase. (R-SEC 75, 76; R-FPC 60, 61; TR-SCPSC, Vol. VI, 74-76.) There has, of course, been one already in Electric & Gas's own area. Quite apart from whether or not the Electric & Gas-Power Company combination would be *willing* to reduce rates, it is perfectly clear that *they are in no position to do so.* For one thing, most of the total new construction program of $20,000,000 will find its way into the combined rate base. For another there can be no doubt that, that as a practical matter the high earnings of the Power Company, which the responsible officer of the South Carolina Commission's Staff described as being "ripe for a rate reduction" (R-SEC 46-48; R-FPC 31-33), will be averaged out with the low earnings of Electric & Gas. It is well known that the opportunities for high inter-company charges between parent and subsidiary are very great and

are subject to little practical control by regulatory agencies. (R-FPC 12, 13.) The record shows that Electric & Gas refused to make any commitments to the South Carolina Commission respecting such charges. (R-SEC 82-84; R-FPC 67-69, TR-SCPSC, Vol. VI, 123-125.)

4. Finally, there are other considerations which should be mentioned briefly. The Authority has undertaken to sell distribution facilities to municipalities and rural cooperatives in order to assure the wider use of power. (R-SEC 56; R-FPC 41.) Electric & Gas, however, has refused on principle to make such sales. (R-SEC 75; R-FPC 60.) In this same connection the record shows that control of the Power Company gives access through the latter's Stevens Creek Plant to the cheap power available to South Carolina from the great Federal hydro project at Clark's Hill. (R-SEC 35, 73; R-FPC 20, 58.)

These considerations give an added point to the policy issue involved here. Most of the power available to the Coastal Plain is public power, power from the great Pinopolis and Clark's Hill hydro projects built at the taxpayers' expense. Only if the Authority acquires the Power Company can this enormous investment of the taxpaying public be dedicated to the service of the consuming public on the terms contemplated when the investment was made, i.e., as freely and as inexpensively as possible. (R-SEC 59, 60; R-FPC 44, 45.)

It is significant that at the hearings before the South Carolina Commission and the SEC no witness was bold enough to deny that the Authority-Power Company combination was a better one in the public interest than the combination of the Power Company with Electric & Gas and that even hostile witnesses impliedly admitted this. (R-SEC 47, 77-82; R-FPC 32, 62-67.)

Order and Opinion of the SEC.

On November 12, 1947, Commonwealth filed its application with the SEC seeking authorization and approval of the sale to Electric & Gas and exemption from the competitive bidding requirements of Rule U-50. By its opinion and orders of March 25, 1948, the Commission granted these applications in full.

In its opinion the SEC, without purporting to hold that the *Creech* decision was a bar to the Authority's right to acquire the Power Company, did find that the decision created "grave doubt" as to this right, that delay would be involved in resolving this doubt through a final ruling on the matter by the Supreme Court of South Carolina, that this delay might be injurious to the interests of Commonwealth, and that accordingly Commonwealth's management was warranted in rejecting the Authority's superior offer. (R-SEC 19, 20; R-FPC 91, 92.)

The SEC accepted at face value Commonwealth's profession that its decision to accept the lower offer was in large part the result of this "doubt". (To its stockholders, of course, Commonwealth had also justified its action on the ground that sale to the Authority would constitute "a publicly operated threat to the neighboring southern companies remaining subsidiaries of Commonwealth.") (See page 7 *supra*.) The Commission ignored the fact that any delay in securing a court decision was directly ascribable to Commonwealth's refusal to honor its commitment to cooperate in getting one. (TR-SEC 169, 170.) The SEC's findings as to delay were inconclusive and were made in the face of a showing in the record that in two comparable cases decisions of the South Carolina Supreme Court had been forthcoming within 30 and 60 days respectively after the commencement of proceedings. (R-SEC 39; R-FPC 24.) Its findings as to any possible injury to Commonwealth as a result of a few weeks delay, (after simplification proceedings under the Act going back

for over seven years), were speculative and unsubstantial. (R-SEC 20; R-FPC 92.)

Finally, and most important, the SEC failed to weigh against any such possible injury to Commonwealth the vital facts relating to "consumers" and "public interest" as required by its Act and Rules before approving the sale. (R-SEC 21, 22; R-FPC 93, 94.)

Thus the SEC declined to consider as pertinent to its decision any of the voluminous evidence bearing upon the consumer and the public interest, which it declared it left without prejudice to the consideration of the FPC. Its justification for doing so is most succinctly set forth in the SEC brief in the Court below.[18]

> "Petitioner observes that Section 12(d) of the Holding Company Act speaks of the public interest and the protection of investors, and its principal argument is that the Commission should therefore have considered whether a sale to Petitioner would have been more advantageous to consumers than a sale to Electric & Gas. This, however, was an issue, assuming it to be otherwise within the scope of Section 12(d), directly committed to the Federal Power Commission which alone had jurisdiction over the acquiring Company and consequently the acquisition aspect of the transaction." (SEC Brief Below, p. 14.)

Later in its brief (SEC Brief Below, p. 21, 22) the SEC goes on to explain that in its view the reason that only the FPC could properly give consideration or weight to the consumer and public interest aspects of the transaction was that this was required by Section 318 of the Federal Power Act, designed to prevent overlapping of jurisdiction between the SEC and FPC.

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[18] The SEC brief in the Court below, herein called "SEC Brief Below", is filed as Appendix "A" to this petition.

Order and Opinion of the FPC.

On November 19, 1947, Electric & Gas applied to the FPC for approval of the acquisition under Section 203(a) of the Federal Power Act. On April 29, 1948, the FPC entered its order and opinion granting this application.

In its opinion the FPC has summarized at length the arguments of the Authority and other opposing parties as to why the acquisition by Electric & Gas was not in the public interest. Like the SEC it does not deny that substantially greater benfits to the public and consumers would derive from sale to the Authority. However, the FPC notes in its opinion that it "is confronted with the fact of the very limited scope of its jurisdiction in this case, running only to the acquisition of stock by the Applicant, and the division of authority and responsibility with other regulatory agencies over the transaction as a whole". (R-SEC 93; R-FPC 6.) It goes on to declare that such matters as the Authority's higher offer and Commonwealth's discriminatory course of dealings with the Authority were for the SEC to consider as "matters relating to the sale . . . over which we have no jurisdiction". Similarly, it found the rate issue to be "subject to the jurisdiction of the State Commission." (R-SEC 95; R-FPC 8.)

As regards the other evidence before it showing greater advantage to consumers and the public from sale to the Authority, the FPC dismissed this as relating to a "plan not presently before us" and hence was "insufficient to support a finding that the proposal formally before us is not consistent with the public interest". (R-SEC 94; R-FPC 7.) It appears, moreover, from the FPC's brief in the Court below [19] that that Commission considered that the Authority had "for all practical considerations" been eliminated as a contender for the Power Company

[19] The FPC brief in the Court below, herein called "FPC Brief Below", is filed as Appendix "B" to this petition.

by the SEC's prior action approving the sale to Electric & Gas and that accordingly by the time the matter came to the FPC for decision there was available no real alternative to acquisition by Electric & Gas. (FPC Brief Below, pp. 14 and 15.)

The FPC did not, however, make any reference to the *Creech* case or seek to justify its decision on the grounds that the Authority's offer could be disregarded because of the *Creech* decision or any "doubts" engendered thereby.

After thus sidestepping the above-mentioned important facts bearing on the issues of public and consumer interest, the FPC went on to base its approval of the sale to Electric & Gas upon a peculiar interpretation of the decision of the Ninth Circuit Court of Appeals in *Pacific Power & Light Company et al.* v. *Federal Power Commission,* 111 F. 2d 1014 (1940), which the Commission regarded as requiring approval unless there were a positive disadvantage and injury to the public interest from the proposed transaction. (R-SEC 94; R-FPC 7.) Viewing the matter without taking into consideration the Authority's offer, the FPC was unable to find any such injury or disadvantage in the case of sale to Electric & Gas. (R-SEC 94; R-FPC 7.)

The Opinion Below.

On November 10, 1948, the Court below handed down its opinion affirming the orders of both Commissions. (The opinion of the Court is reprinted at R-SEC 310 to 317 and R-FPC 324 to 331.) The opinion turns upon the view of the Court that the Authority's right to purchase the stock of the Power Company was adversely decided by the Supreme Court of South Carolina in the *Creech* case, despite the clear statement of the South Carolina Court that it had not decided and would not then decide that question. The Court below ignored the express refusal of both Commissions to consider the most important relevant evidence be-

fore them bearing upon the public and consumer interest and it paid no attention to the erroneously narrow construction of their respective statutes by which each Commission justified this refusal.

REASONS FOR GRANTING THE WRITS.

Petitioner is in the unusual position of seeking judicial relief, not to restrain the unwarranted encroachments of over-zealous administrative agencies, but to free the two Commissions below from inhibitions self-imposed early in 1948 which would prevent them from performing their statutory duty to protect the public, consumers and investors.

Petitioner appealed from the action of the two Federal Commissions because it thought that each had made one of the clearest and most serious errors of law in its entire administrative history. Each statute called for consideration of the public and consumer interest and each Commission left to the other consideration of the unquestioned greater public advantages of an Authority-Power Company combination. The SEC then approved the sale by giving preponderant weight to the possibility of some adverse effect on Commonwealth of alleged "doubts" as to the local law of South Carolina. The FPC apparently did not think that the local law question presented any difficulty at all, but also approved the transaction by finding that when considered *in vacuo*, without regard for the Authority's offer, it presented no positive detriment to the public interest. To Petitioner's astonishment the Court below went even beyond the SEC in holding that the South Carolina law was not only doubtful but already decided against us. This was clearly erroneous in view of what the South Carolina Court said when denying rehearing in the *Creech* case that it had not and would not then decide the point. The proper and easy answer to this question of the local law would have been for the SEC to have or-

dered competitive bidding for the Power Company's stock and thereby to have enabled the Authority to get a decision from the South Carolina Court. A competitive bidding order would have created a justiciable issue upon which the Authority could have secured such a decision. (Page 11, *supra.*) It must be remembered that Commonwealth had earlier undertaken to help the Authority to do this by making a contract with it. When later Commonwealth reneged the only way the necessary issue could be raised was by a competitive bidding order. (Page 11, *supra.*) If the SEC had weighed the public interest factors involved, instead of leaving the matter to the FPC, it would undoubtedly have followed such a course. In any event it committed a palpable error of law in not considering these relevant facts in reaching its decision.

The FPC was confused by what the SEC did and also failed to consider the public interest issues raised by the alternative of an Authority-Power Company combination.

While this may not be a case of such world-shaking importance as some with which this Court must deal, it is one of substantial importance. It is a case of two Federal Commissions each passing to the other a responsibility committed to it by statute so that vital public interests have been neglected and it is a case where a Circuit Court of Appeals has avoided passing on the issue before it by treating as decided a question of State law expressly left open by the State Court and which should have been left to the State Court. The end result has been to deprive half the people of South Carolina of much lower utility rates and to permit a public body to be discriminated against by the high-handed and admittedly selfish tactics of a big public utility holding company with complete disregard for the public interest.

In summary, Petitioner urges this Court in its discretion to grant these writs for the following reasons:

1. The United States Court of Appeals for the Fourth Circuit by affirming the said orders of the SEC

and FPC has decided questions of Federal law of general importance and of substance relating to the construction and application of two statutes of the United States (The Public Utility Holding Company Act of 1935 and the Federal Power Act) and their relation to each other, which have not been but which should be settled by this Court.

2. The United States Court of Appeals for the Fourth Circuit has decided an important question of State law in a way directly in conflict with applicable State decisions, i.e., by deciding that the *Creech* case bars the Petitioner's right of purchase in this situation when that question was expressly left open by the Supreme Court of South Carolina, and in so doing has departed from the rule laid down by this Court that whenever possible Federal Courts should leave matters of State law to the decision of the State Courts.

CONCLUSION.

For the foregoing reasons, supported by argument in the accompanying brief, it is repectfully submitted that the petition for writs of certiorari should be granted.

Respectfully submitted,

R. M. Jefferies,
Wm. S. Youngman, Jr.,
Duncan C. Lee,
Counsel for South Carolina Public Service Authority.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, and THE COMMONWEALTH & SOUTHERN CORPORATION.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

FEDERAL POWER COMMISSION and SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

THE OPINIONS AND ORDERS BELOW.

Reference to the opinions and orders below is made in the petition, page 2. They are set forth in full in the printed record. The opinion of the Court of Appeals for the Fourth Circuit appears at R-SEC, pages 310 to 317 and R-FPC, pages 324 to 331, the opinion and order of the SEC at R-SEC, pages 2 to 29 and R-FPC, pages 74 to 101, and the opinion and order of the FPC as R-SEC, pages 89 to 97 and R-FPC, pages 2 to 10.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked are shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, pages 4 to 21.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 3 and 4, under the heading "Questions Presented."

V.

ARGUMENT.

1. **The United States Court of Appeals for the Fourth Circuit, by affirming the said orders of the SEC and FPC, has decided questions of Federal law of general importance and substance relating to the construction and application of two statutes of the United States (The Public Utility Holding Company Act of 1935 and the Federal Power Act) and their relation to each other, which have not been but which should be settled by this Court.**

This is a case of far reaching importance to the public and particularly to consumers and investors of public utilities throughout the United States. The central issue on the merits is whether the public may be assured that the SEC and FPC will only authorize transactions coming before them for approval under their respective Acts when the standards established in those Acts are fully met.

We have here the curious spectacle of two Commissions who in early 1948, after a distinguished record of energetic concern for the public interest, have, in a sudden excess of

timidity, adopted so narrow a view of their jurisdiction and powers that unless their construction is corrected by this Court, the public interest must in the future, as it has here, frequently fall abandoned between them.

Neither Commission has denied (and the Court below has made no finding to the contrary) that the evidence before them shows that the consuming public of South Carolina would be far more benefitted by the sale of this property to Petitioner than the sale which they have approved to Electric & Gas. Nor have they denied that the investors of Commonwealth would have received an additional $1,400,000 from sale to the Authority, or that Commonwealth's course of dealings with the Authority, particularly as regards the restrictive conditions sought to be imposed, was highly discriminatory if not illegal.

In the face of such a record the two Commissions have approved the sale to Electric & Gas only by refusing to consider the most important relevant evidence before them. It is well established by the decisions of this Court that the refusal of an administrative agency to consider relevant evidence is an abuse of discretion for which the agency's order may be set aside.[20] Here each of the two Commissions has admitted its failure to consider relevant evidence but has justified its refusal by so misconstruing its statute as to exclude the evidence from what it considers to be the narrow purview of its own jurisdiction.

The opinion and order of each Commission is based upon such reversible error. Together these errors represent decisions of questions of Federal law of substantial importance which must inevitably affect the vital interests of consumers of public utility services, investors in public utility securities, and the tax-paying public throughout the country. These questions have not been but should be decided by this Court.

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[20] *Morgan* v. *U. S.*, 298 U. S. 468, 480 (1936), *The Chicago Junction Case*, 264 U. S. 258, 265 (1924). See also cases cited by Mr. Justice Brandeis in his concurring opinion in *St. Joseph Stockyard Co.* v. *U. S.*, 298 U. S. 38, 75 (1936).

The Court below evidently tried to avoid passing upon these questions of law by holding that the Supreme Court of South Carolina in its decision in the *Creech* case had already ruled the Authority to be without power or legal right to purchase this property. This decision of the Court below was plainly wrong, as will be shown more fully hereinafter. The basic questions presented to this Court are the errors in interpretation of Federal statutes made by the two Commissions in their opinions and orders.

A. THE SEC HAS ERRED IN HOLDING THAT UNDER SECTION 12(d) OF THE HOLDING COMPANY ACT AND RULE U-50 ISSUED THEREUNDER THERE WAS NO COMPULSION UPON IT TO WEIGH OR GIVE CONSIDERATION TO EVIDENCE BEARING UPON THE INTERESTS OF THE PUBLIC AND CONSUMERS.

Section 12(d) of the Holding Company Act expressly states that the SEC must in approving transactions thereunder (including of course the sale of securities in connection with a Section 11(e) plan) act "in the public interest" and "for the protection of consumers or investors."[21] These standards are in terms set forth again in the SEC's Rule U-50 issued under Section 12(d).[22]

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[21] Section 12(d) of the Public Utility Holding Company Act makes it unlawful for any holding company to sell the securities of a subsidiary

> "in contravention of such rules and regulations or orders regarding *the consideration to be received for such sale, maintenance of competitive conditions*, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the *public interest* or for the protection of *investors* or *consumers* or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder." (Set out in full at R-SEC 111.)

[22] The SEC's Rule U-52, issued pursuant to Section 12(d) of the Public Utility Holding Company Act of 1935, requires public competitive bidding on the sale of securities by a registered holding company except *inter alia* where the Commission find that such competitive binding is not "appropriate to aid the Commission . . . to determine . . . whether any term or condition of such issue or sale

Nevertheless the SEC was able to approve under Sections 12(d) and 11(e) of its Act and exempt from the competitive bidding requirements of its Rule U-50 a sale which imposed upon the stockholders of Commonwealth a sacrifice of $1,400,000 and offered to the public and consumers of the area far fewer advantages (if not positive detriment and harm as Petitioner believes) than the available alternative of sale to Petitioner. The SEC achieved this result by virtue of a definition of its jurisdiction which leaves meaningless the statutory reference to the public and consumers.

The burden of the SEC's opinion concerns the *Creech* decision and its effect upon the position of the Authority. Almost as an afterthought, but indispensably to the final result, the Commission goes on to say that the substantial considerations of consumer and public interest relating to financial structure, generating capacity, etc., were left "without prejudice" to the FPC. (R-SEC 21, 22; R-FPC 93, 94.) In its brief below it explains that in its view the question "whether a sale to Petitioner would have been more advantageous to consumers than a sale to Electric & Gas . . . was an issue . . . " of which the FPC "alone had jurisdiction." (SEC Brief Below, p. 14.)

The SEC brief spells out the full syllogism behind this surprising conclusion, as follows. These public policy issues pertain to the "acquisition" phase of the transaction. The FPC alone had jurisdiction of the acquiring company, Electric & Gas, and therefore of the acquisition. Consequently the FPC alone had jurisdiction to consider and weigh the evidence bearing on these policy issues. Q. E. D. (SEC Brief Below, pp. 14-25.)

The fallacy in this line of reasoning is apparent. It lies in the major premise that the interest of the public and

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is detrimental to the *public interest* or the *interest of investors* or *consumers*" or where the requirement is not "necessary or appropriate in the *public interest* or for the protection of *investors* or *consumers* to assure the *maintenance of competitive conditions, the receipt of adequate consideration* or the reasonableness of any fees or commission to be paid with respect to sales of securities subject to Section 12(d) of the Act." (Set out in full at R-SEC 112-114.)

consumers relates *only* to the "acquisition" phase of the transaction and that accordingly the SEC can close its eyes to evidence bearing upon these issues when weighing the merits of the "disposition." The pertinent language of the Holding Company Act and Rule U-50 which specifically enjoin the SEC to protect the interest of the public and consumers when passing upon a "disposition" is sufficient demonstration of this error. There is nothing in the Act or elsewhere, to justify the Commission disregarding the principal consequences for consumers and the public of the single transaction before it, considered as a whole and in all its aspects.

In support of its reasoning the SEC points out in its brief that Section 318 of the Federal Power Act provides in effect that where a person is subject with respect to the sale, etc., of securities to both a requirement, rule or regulation under the Holding Company Act and a requirement, rule or regulation under the Federal Power Act, the requirement of the Holding Company Act shall, in the absence of an express exemption by the SEC, apply. (SEC Brief Below, pp. 21, 22.)[23] This Section was designed to de-

[23] The full text if Section 318 of the Federal Power Act is as follows:

> "SEC. 318. If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person."

fine the respective jurisdiction of the two Commissions in case of overlapping. Quite obviously it was intended to prevent administrative overlapping. It was surely not intended to relieve the SEC of its duty under Section 12(d) to protect investors and consumers, nor does it imply that the two Acts set up two conflicting or opposed standards of public policy and public and consumer interest, one applicable to SEC action and the other to action of the FPC. On the contrary, as noted by the SEC in its brief below, "The Holding Company Act and the Federal Power Act were enacted together as component parts of a single statute, the former being Title I and the latter Title II, Part II of Public Law 333 of the 74th Congress, 49 Stat. 803, 847." (SEC Brief Below, p. 21.) As the SEC also points out, (SEC Brief Below, p. 24, fn. 20) the Senate Report on the Federal Power Act speaks as follows of Section 203(a):

> "It complements Title I of the Bill by directing the [Federal Power] Commission to prevent transfers or consolidations of property which would impair the ability of public utilities to render adequate service or impede, or tend to impede, the coordination in the public interest of facilities subject to the jurisdiction of the Commission." (S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 50.)

The record before the SEC showed overwhelmingly that the effect of this transfer would mean such impairment. The foregoing statement of policy in the Senate Report was made with reference to Section 203(a) of the Federal Power Act but it is equally applicable to the language of Section 12(d) of the Holding Company Act enjoining protection for the public and consumers. Otherwise that language is meaningless. The SEC admits that the two Acts complement each other and represent an integrated piece of legislation. It can hardly be said therefore that Section 318 of the Power Act excuses the SEC from its duty under Section 12(d) of the Holding Company Act to protect consumers and the public interest or to consider the effect

upon them of the proposed transaction viewed as a whole, in both its "disposition" and "acquisition" phases. In fact, the distinction between the two "phases" is wholly artificial, and attempting to make such an unrealistic distinction led the SEC into the error of law it committed, that of failing to consider the most important relevant evidence in reaching its decision.

On any interpretation the language of Section 318 fails the SEC in its argument as applied to this situation. Section 318 speaks of a "person" who may be subject to the requirements of both Acts with respect to a particular transaction. The "person" before the SEC here was Commonwealth, and Commonwealth, as both Commissions have pointed out, was not subject to the FPC as regards this sale. Electric & Gas was the applicant before that Commission, and there could therefore be no such administrative overlapping as Section 318 was intended to resolve.

The SEC had to ignore the consumer and public interest evidence before it in reaching the result it did; otherwise it could never have given such preponderant weight to the preferences of Commonwealth's management. The SEC had accepted the argument that Commonwealth was justified in accepting the Authority's superior offer because of the "doubts" arising from the *Creech* decision. (R-SEC 19; R-FPC 91.) Even assuming that these doubts were *bona fide* ones on Commonwealth's part, the possible injury to Commonwealth from the chance that sale to the Authority might be held to be *ultra vires* or from the inconsequential delay involved in securing judicial clarification of the matter were all speculative and unsubstantial compared with the certain detriment and injury to the public and consumers from sale to Electric & Gas—so much so, in fact, that *the SEC could not possibly have justified its approval of this sale if it had given weight to these public interest considerations.* It is this that makes the Commission's view of its own jurisdiction and powers, as justifying its omission to give weight to these considerations, of such central importance to its final decision in this case.

B. THE FPC ERRED IN TAKING TOO NARROW A VIEW OF ITS OWN JURISDICTION IN PASSING UPON TRANSACTIONS UNDER SECTION 203(a) OF THE FEDERAL POWER ACT.

Whatever the errors and derelictions of the SEC, it can hardly be argued that in determining whether this transaction was "consistent with the public interest" within the meaning of Section 203(a) of the Federal Power Act,[24] the FPC, at least, was not required to give consideration and weight to the evidence before it bearing upon the consumer and public interest issues raised by the superior offer of the Authority. This evidence was certainly highly relevant to whether, in the language of the Senate Report, the transfer "would impair the ability of public utilities to render adequate services or impede, or tend to impede, the coordination in the public interest of facilities subject to the jurisdiction of the Commission." (See page 31, *supra*.) Yet the FPC refused to consider this evidence and justified its refusal by an erroneously narrow and restrictive interpretation of its own jurisdiction and by what it considered to be the practical effect of the prior action taken by the SEC.

The FPC disregarded all evidence relating to Commonwealth's acceptance of the lower offer of Electric & Gas and

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[24] The full text of Section 203(a) of the Federal Power Act is as follows:

> "SEC. 203 (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons, as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same."

its discriminatory dealings with the Authority on the ground that these factors pertained to the "sale . . . over which we have no jurisdiction." (R-SEC 95; R-FPC 8.) This was erroneous. The evidence was relevant to the public interest and should have been considered and given proper weight by both Commissions.

The FPC also erred in refusing to weigh in its decision the fact that a combination of the Power Company with the Authority would inevitably result in lower rates to the Power Company's consumers than the combination with Electric & Gas—owing to such objective factors as financial structure and lower requirements for new generating plant —on the ground that the *regulation* of rates was a matter for the South Carolina Commission. (R-SEC 95; R-FPC 8.)

The point as to rates, of course, was that in view of the certain increase in the joint rate base from the $20,000,000 5-year construction program which Electric & Gas admitted would be necessary if it acquired the Power Company—all or virtually all of which would be unnecessary if the Authority acquired the Power Company (See page 15 of the petition)—and in view of the high probability that the low earnings of the parent would be averaged out with the high earnings of the subsidiary as a result of uncontrollable inter-affiliate charges (See pages 15, 16 of the petition), substantially higher rates would almost certainly result from a combination of the Power Company with Electric & Gas than from its combination with the Authority. The two Federal Commissions were not called upon to regulate rates, but they should have considered the rate consequences of action they took. By approving sale to Electric & Gas they approved a holding company set-up which inevitably resulted in higher rates *because the set-up itself made it practically much more difficult if not impossible for any regulatory agency thereafter to remedy the situation.*

The FPC thus managed by the same line of reasoning as the SEC to eliminate from consideration a substantial part

of the evidence bearing upon the public and consumer interest. The FPC also found that it could ignore this and the remaining such evidence, i.e., relating to adequacy of generating facilities, financial condition, control of power from the Clark's Hill project and sales to rural cooperative and municipalities, by virtue of its interpretation of the decision of the Ninth Circuit Court of Appeals in *Pacific Power & Light Company et al.* v. *Federal Power Commission*, 111 F. 2d 1014 (1940). In this case the Court had held that in order to find a proposed transaction "consistent with the public interest" within the meaning of Section 203(a) of the Federal Power Act it was not necessary that there should be a positive benefit to the public so long as the public was insured against disadvantage. (111 F. 2d 1014, 1016; R-SEC 94; R-FPC 7.) This decision the FPC now takes quite erroneously to mean that a proposed transaction should be considered and passed upon by it without any regard for its attendant circumstances, such as, in the present case, the far greater advantages to the public and consumers which would result from sale to the Authority. After quoting the pertinent passage from the opinion of the Court in the *Pacific* case, (111 F. 2d 1014, 1016) the FPC then dismisses the Authority's superior offer with its vital bearing upon the consumer and public interest by saying:

> "Granted such a proposal, or some other plan not presently before us, might be better in certain aspects, nevertheless that fact is insufficient to support a finding that the proposal formally before us is not consistent with the public interest." (R-SEC 94; R-FPC 7.)

This reasoning is plainly fallacious. The Authority's offer was certainly "before" the FPC as among the attendant circumstances, established by the record, which the FPC should have weighed in considering the application of Electric & Gas. With this more advantageous alternative available, sale to Electric & Gas does, of course, result in "disadvantage" to the public. If the FPC had taken Petition-

er's offer into consideration it could hardly have reached any other result. There is certainly nothing in the *Pacific* case which prevents the FPC from considering such circumstances. Rather it is quite clear that the Court believed that the FPC should consider them, for later in the same opinion it says "the Commission must necessarily take an overall view and in many cases it will, as its counsel says, be called upon to weigh considerations pro and con." (111 F. 2d 1014, 1017)

Finally, there can be no doubt that the FPC found it easier to close its eyes to the greater public advantages of sale to the Authority since it quite evidently felt, as its brief below shows, that the prior action of the SEC approving sale by Commonwealth to Electric & Gas had had the effect of eliminating the Authority's offer as an available alternative.

> "When the order here under review was issued by the Federal Power Commission, the Securities and Exchange Commission had already entered the divestment order, Commonwealth had contracted to make the sale to Electric & Gas, and the Securities and Exchange Commission had approved the sale and denied a petition for rehearing.
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> "In summing up this point, the record shows that when the matter was before the Federal Power Commission the chances of Authority acquiring the stock of Power Company were, for all practical purposes, *nil*. * * *" (FPC Brief Below, pp. 14, 15.)

In brief, after the SEC had referred the evidence on the pubic and consumer interest to the FPC as the agency properly responsible, the latter considered itself foreclosed from considering this evidence by the very act of the SEC in referring it over. The result of course was that the evidence and the pertinent issues which it raised were not considered at all. Their reasoning may satisfy the two Commissions but will be small comfort to the consuming public, which can reasonably expect that when Congress had enjoined both

Commissions to protect its interests one of them at least should have done so.

C. THE JOINT EFFECT OF THE ACTION OF THE TWO COMMISSIONS HAS BEEN TO SQUEEZE OUT THE INTERESTS OF THE PUBLIC AND CONSUMERS FROM CONSIDERATION BY EITHER OF THEM IN PASSING UPON TRANSACTIONS UNDER BOTH SECTION 12(d) OF THE HOLDING COMPANY ACT AND SECTION 203(a) OF THE FEDERAL POWER ACT.

Petitioner considers that the central issue in both these proceedings and the one to which it respectfully invites this Court's particular attention is raised by the fact that the sale to Electric & Gas was a transaction which required the express approval of both the SEC and FPC, who between them administer what the SEC calls "the component parts" of a "single statute" (SEC Brief Below, p. 21). This sale in its particular circumstances involved considerations which neither Commission has denied made its consummation inconsistent with, if not directly violative of, standards of public, consumer and investor interest which both Commissions concede are to be found *somewhere* in this "single statute." Nevertheless the sale was approved by both Commissions because neither would agree that these public policy considerations came within what it conceived to be its own narrow area of responsibility. Unless the plain language of Section 12(d) of the Holding Company Act and Section 203(a) of the Federal Power Act is meaningless in its reference to the public and consumer interest, one or both of the Commissions is obviously wrong and by their decisions the public and consumer interest has been abandoned by default. We consider it clear that both Commissions have erred and that both should have weighed the consierations bearing on the public interest. This error has been compounded by the judgment of the Court below affirming the Commissions' orders.

2. The United States Court of Appeals for the Fourth Circuit has decided an important question of State law in a way directly in conflict with applicable State decisions, i. e., by deciding that the *Creech* case bars the Petitioner's right to purchase in this situation when that question was expressly left open by the Supreme Court of South Carolina, and in so doing has departed from the rule laid down by this Court that whenever possible Federal Courts should leave matters of State law to the decision of the State Courts.

When the law of a State is uncertain because of the absence of a ruling by the Courts of that State, it has been held by this Court to be an abuse of discretion for an outside tribunal, including a Federal Court, not to refer the matter to the State Court for decision. *Railroad Comm.* v. *Pullman Co.*, 312 U. S. 496 (1941); *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159 (1929); *Thompson* v. *Magnolia Petroleum Company*, 309 U. S. 478 (1940). The SEC in effect, and the Court below in terms, have gratuitously undertaken to decide the law of South Carolina and have decided it wrong.

Reference is made to the full statement appearing at pages 8 to 10 of the petition of the facts and circumstances of the *Creech* decision bearing upon the question of the Authority's legal right raised in the present case. There has been no decision of the Supreme Court of the State of South Carolina as to the Authority's legal right to purchase the Power Company or any other facility in its own area. The *per curiam* order of the Court denying rehearing in the *Creech* case, which is set forth at pages 9 and 10 of the petition shows this beyond possible doubt. The Court expressly declined to "go outside of the record" to pass upon the right of the Authority in such a situation. Bonham, C. J., who dissented from the *Creech* decision, in his separate statement expresses regret that the majority refused to grant this "alternative relief." Both he and the majority clearly considered that the decision had not included this question.

There can surely be no better authority on the point than the contemporary view of the Court which handed down the original *Creech* decision.

If the *Creech* case did not decide adversely the Authority's right to purchase facilities in its own area, then the only authoritative statement of the Authority's powers is that appearing in its enabling act. Section 8555-13(7) of that Act, set forth in full at page 8 of the petition, states flatly that the Authority is empowered to "*acquire* . . . power houses and any and all structures, ways and means, necessary, useful or customarily used and employed in the manufacture, generation and distribution of water power, steam electric power, hydro-electric power and any and all other kinds of power." This language is so unqualified and unequivocal that indeed it is hard to understand how the South Carolina Court was able to reach the conclusion it did, even in the circumstances of the *Creech* case. What is certain, however, is that the Court could not possibly have justified a finding of lack of power in that case except by reference to the limitations appearing in the language of Paragraph 21 of Section 8555-13 restricting the Authority's right to make "investigations, studies and considerations" to the area south of Columbia. (R-SEC 120; R-FPC 116.)

Furthermore, a denial of the Authority's right to make this purchase would not only do violence to the clear language of the statute, it would be in conflict with the established line of authority in other jurisdictions. A number of other States have statutes similar to the South Carolina act. In none of them has the State agency been denied the right to acquire existing generating and transmission facilities in its own area. In fact in Texas a narrower statute relating only to development of hydro-electric power and not mentioning steam facilities at all has been construed to allow a State authority to acquire a system with steam generation facilities to coordinate with its hydro-electric generation. *Guadalupe-Blanco River Authority* v. *City of San Antonio,* 145 Tex. 611, 200 S. W. 2d 989, 998 (1947).

In refusing a rehearing in the *Creech* case or to rule that the Authority was empowered to acquire utilities in its own area, the South Carolina Court was taking the most graceful way out of the situation that it could find, i.e., it avoided a direct retraction of the embarrassingly broad language of its opinion but at the same time it refused to make an indefensible application of that language by ruling against the Authority's right. The South Carolina Court certainly left the way open to a judgment favorable to the Authority when and if it should be called upon later to pass upon an acquisition in the Authority's own area. In the light of the statute and authorities, it is difficult to see how it could do otherwise than confirm the Authority's power to make such a purchase.

In the circumstances Petitioner submits that the SEC was unwarranted in its conclusion that the Authority's right was doubtful and that these "doubts" justified the management of Commonwealth in accepting an offer less favorable to its investors, consumers and the public. If possible doubt there was, its basis was so ephemeral, the possibility of harm to Commonwealth in the situation so remote and speculative, and the detriment to the public interest from sale to Electric & Gas so certain, that the action of the SEC can only be described as a gross abuse of discretion. Especially is this so when, as the record shows, the SEC could by ordering competitive bidding have made possible a court determination of the Authority's right without significant delay or prejudice to any party. (R-SEC 38, 39; R-FPC 23, 24.)

A fortiori the action of the Court below was the most glaring error. In affirming the order of the SEC, it found that the Commission's reasoning on this matter of "doubt" to be correct, *for the reason that the Supreme Court of South Carolina had decided that the Authority was without power to make this present acquisition.* The Court ignored the clear statement of the South Carolina Court that it had *not* decided the question in the *Creech* case, it disregarded the broad language of the statute as well as the prevailing

authorities in other jurisdictions, and finally it acted in direct violation of the instructions of this Court in the *Pullman* and other cases cited *supra*. By so disposing of the matter the Court below evidently hoped to avoid giving consideration to the errors of statutory misconstruction which lay at the heart of the decisions of both Commissions. The Court indeed hardly referred to the FPC opinion which contains no mention of the *Creech* case and whose decision did not turn upon that case in any degree.

3. This matter is not moot, nor is the Authority's equitable position impaired by laches.

Some of the respondents have argued below that this matter is moot for the reason that the sale to Electric & Gas was consummated before the Authority filed its petition for review or that the Authority has been guilty of laches in seeking judicial review of the orders complained of. Not all of the respondents made these contentions and they were ignored by the Court below which expressly denied that the matter had become moot. Nevertheless, since the same argument may be made again in opposition to this petition, it will be dealt with briefly.

As to mootness, the sole question is whether intervening events have put it beyond the power of the Court as a practical matter to undo what has been done. Otherwise, the mere fact that the transaction in question has been consummated prior to judicial review will not render the controversy moot. *The Chicago Junction Case*, 264 U. S. 258 (1924). The Court below, moreover, found that it did have the power to grant relief in this situation:

> "Motions have been made to dismiss both cases on the grounds that the contract for the sale of the stock has been carried out and that the cases have been rendered moot. We have no doubt, however, as to our power to order the parties to set aside the sale and restore the situation that existed prior to the entry of the orders if we thought them invalid for any reason. The power of the court to review orders of the Commissions and grant effective relief may not be defeated by

compliance with the orders. *The Chicago Junction Case,* 264 U. S. 258." (R-SEC 316; R-FPC 330)

As a practical matter the *status quo* in this case can be restored so that no party will be injured and some indeed will be benefitted. Thus, the continuing offer of the Authority for the stock of the Power Company is $1,400,000 more than the price paid by Electric & Gas. Commonwealth and its security holders can, therefore, be certain that on sale to the Authority they will be paid more than they have received. The corporate identity of the Power Company has been preserved and its stock can be returned to Commonwealth or transferred to another purchaser. Electric & Gas will receive back the purchase price which it paid and will be in a position to make an equitable settlement with those who have acquired its securities issued in connection with this transaction. Even as to underwriters' commissions and other expenses of the sale, the interim earnings of the Power Company are such that there will be no difficulty in satisfying any just claims of this character.

The SEC, Commonwealth and Electric & Gas in their briefs below have each charged the Authority with laches in failing to seek a stay of the Commissions' orders before appealing and in failing to give notice of intention to appeal The FPC did not join in this contention. The charge itself is unfounded and was ignored by the Court below in its opinion.

The Authority filed its petitions for review with the Court below within the times prescribed by Section 24 of the Holding Company Act, Section 313 of the Federal Power Act, and Section 10 of the Administrative Procedure Act, none of which conditions the right of judicial review upon notice or stay. Nor was there any requirement of equity. The parties were quite aware of the Authority's intentions. After the SEC order there was wide publicity in the press of Charleston and Columbia, South Carolina, to statements made on behalf of the Authority that it would not stop fighting "until all possibilities are exhausted" including, spe-

cifically, resort to the courts. This story even appeared in the house organ of Electric & Gas. (R-SEC 302; R-FPC 316.) Investors and underwriters were put on full notice by the prospectus of Electric & Gas dated May 11, 1948, in which the status of all proceedings was set forth and which carefully pointed out that the appeal periods had not expired. (R-SEC 303; R-FPC 317.) If any party had had *bona fide* doubts as to the Authority's intentions it could have inquired of the Authority. No such inquiry was ever made.

As to a stay, this is normally sought by a party who fears that its interests may be irreparably impaired if the threatened act takes place. Since the transaction could be undone and the *status quo* restored, the Authority had no such fear of irreparable injury. Besides which, quite frankly it did not believe that Commonwealth and Electric & Gas would be reckless enough to rush through the sale in the face of probable appeals.

If there has been any impairment of equities, it is of the position of the intervening respondents who acted with unseemly haste to conclude the sale before the Authority should appeal. There is not one jot of plausible evidence in the record to show why they could not have waited until the appeal periods had expired. In the circumstances one must conclude that these parties were making every effort to defeat the jurisdiction of the Federal Courts by presenting them with what was hoped to be a *fait accompli.*

VI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted and urged that the petition for writs of certiorari should be granted.

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